

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

BAILEY MACHINERY MOVERS
AND FABRICATORS, INC.^{1/}

Employer

and

Case 9-RC-18174

INDIANA KENTUCKY REGIONAL COUNCIL
OF CARPENTERS AND MILLWRIGHTS,
MILLWRIGHTS LOCAL #1031

Petitioner

REGIONAL DIRECTOR'S DECISION AND
DIRECTION OF ELECTION

I. INTRODUCTION

The Employer is engaged in the transportation and installation of heavy equipment for industrial customers, as well as the fabrication of components associated with the installation of such equipment. Although most of the work performed by the Employer occurs at its customers' premises, the Employer operates out of two facilities: a primary location in Lancaster, Kentucky and a satellite facility in Somerset, Kentucky. The parties agree that a unit consisting of all full-time and regular part-time employees employed by the Employer working at or out of its facilities in the Commonwealth of Kentucky, including employees who perform work assignments outside of the Commonwealth of Kentucky, excluding the full time scheduler, full-time buyer/purchaser, office clerical employees, professional employees, guards and supervisors as defined in the Act is appropriate -- which is essentially the unit sought by the Petitioner. There are approximately 50 employees in this unit.

The parties disagree concerning the unit placement of employees in several classifications. Thus, the Employer, contrary to the Petitioner, contends that an appropriate unit must include seven estimators -- Larry Berry, Randy Cable, David Durham, Don Meade, Walt Sawchuck, Dean Turner and Steve Weet -- who are involved in the bidding for customer work. Although not asserted at the hearing in this matter, the Petitioner takes the position in its brief that the estimators are supervisors within the meaning of Section 2(11) the Act.

^{1/} The name of the Employer appears as amended at the hearing.

The Petitioner seeks to include four group leaders,^{2/} -- James King, Bryan Mills, Leslie Vanderpoole and Rodney West. However, the Employer contends that these individuals are statutory supervisors. In addition, the Employer argues that three of the group leaders -- Mills, Vanderpoole and West -- should be excluded because they lack a community of interest with other employees in the proposed Unit. The Petitioner also seeks to include the Machine Shop Supervisor, Russell Caudill, in the Unit as a “residual” category of employee. However, the Employer takes the position that Caudill is a supervisor and/or managerial employee and, in any event, does not share a community of interest with other Unit employees. Finally, the Employer contends that Earl Napier, an employee, who works almost exclusively at one particular customer’s facility (formerly with Vanderpoole and now with West) should be excluded because he lacks a community of interest with other Unit employees.

In addition to these disputed individuals, the Petitioner seeks to include Sonny Drew, who is referred to in the record as a “mechanic.” The Employer’s position on Drew’s placement in the Unit is unclear.

As set forth in detail below, I have determined that the estimators, the group leaders and the shop supervisor are not supervisors within the meaning of the Act as the evidence does not establish that they have any true indicia of supervisory authority. I also find that the group leaders, the shop supervisor and Napier share a sufficient community of interest with the other employees in the Unit to warrant their inclusion. Further, I have concluded that the estimators should be included in the Unit because they too share a substantial community of interest with other unit employees, and if not included, they would be left as a residual classification which the Board seeks to avoid. Finally, I will include the mechanic in the Unit because the Employer has not articulated any reason to exclude him and if not included, he would be left as the only non-office, non-managerial, non-supervisory employee excluded.

In reaching my determination on these issues, I have considered the record evidence as a whole, as well as the arguments made by the parties at the hearing and in their post-hearing briefs. In explaining how I came to my determination on these issues, I will first describe the Employer’s operations, then set forth the applicable legal precedent, and finally analyze each issue in relation to that precedent. Before beginning my analysis it is noteworthy that there is no history of collective bargaining affecting any of the employees involved in this proceeding and that the Petitioner has agreed to proceed to an election in any unit found appropriate.

^{2/} This category of employee is referred to by various titles in the record, including “site supervisor.” I choose to refer to these individuals as “group leaders” because this is the title appearing on certain documentation in the record involved with assigning them to particular projects. I note that giving employees the title “supervisor,” or even theoretical power to perform one or more enumerated supervisory functions, does not make a statutory supervisor out of a rank-and-file employee; the important thing is the possession and exercise of actual supervisory duties. See, e.g., *Heritage Hall, EPI Corp.*, 333 NLRB 458, 458-459 (2001); *Winco Petroleum Company*, 241 NLRB 1118, 1122 (1979).

II. FACTUAL OVERVIEW ^{3/}

A. The Employer's Operations and Workforce:

The Employer is engaged in a business that supplies skilled workers and equipment to move, transport and install production equipment for customers that lack the capability to move their own equipment. The equipment to be moved and placed in the customer's facility generally encompasses very large pieces such as printing presses, stamping machines and conveyors. The Employer also fabricates and machines components needed to install the machinery. In addition, the Employer prepares and crates equipment for shipment out of customers' facilities for clients which desire this service.

A variety of job skills are possessed by various unit employees to perform the Employer's services. While several employees have a variety of job skills, not every employee possesses all the skills needed for a job. Thus, it is estimated that there are at most 10 or 12 employees qualified to do heavy rigging of equipment and only a few employees are certified to weld pipe. About half of the proposed Unit can do pipefitting work; somewhat over half can do maintenance repairs or fabrication work and a third of the employees are qualified to operate the heavier fork lifts. Although three or four employees can do machining work, only two of these would be considered totally qualified machinists.

As indicated previously, the Employer's main facility is located at Lancaster, Kentucky, which houses the offices of the Employer's managers and supervisors. The highest official in the company is General Manager Richard Cable, whose second in command is Operations Manager David Eschete. Below Eschete are Scheduler Mark Durham and Buyer/Purchaser Charlie Anness, whom the parties agree are managerial employees and should be excluded from the Unit. The clerical staff, also located in this facility, includes Office Manager Bobby Carrier and apparently at least one other clerical employee. The Lancaster facility also includes the machine/fabrication shop, which is the work site for Shop Supervisor Russell Caudill.

The satellite facility in Somerset, Kentucky, which has a wood shop, is approximately 50 miles from the Lancaster facility, but only a few employees work at this location. Some employees reside near Somerset, more near Lancaster, but there are no bright lines drawn as to which facility an employee is assigned. Employees may work out of one location or the other based on the Employer's operational needs. Moreover, employees often will report directly to the customers' operations, rather than to the Employer's Lancaster or Somerset facilities.

^{3/} The Employer advises that General Manager Richard Cable, the Employer's highest person in authority, was unavailable to prepare for the hearing or to testify at the hearing because his daughter was hospitalized in a coma and that it was therefore prejudiced. It moves to be allowed to present affidavit evidence from him. Although Cable may be at the apex of the supervisory hierarchy, the second highest company official, Operations Manager David Eschete, as well as two managers below him, Scheduler Mark Durham and Buyer/Purchaser Charlie Anness, testified at the hearing. A full record was developed and it does not appear there are any relevant facts to which only Cable would be privy. Therefore, the motion to present affidavit evidence is denied.

Estimators

The Employer's customer base is primarily developed and maintained by the seven estimators. It appears that certain, if not all, of the estimators once worked as crew members performing the moving and placing of equipment.^{4/} The estimators attempt to maintain good relations with the Employer's existing customer base by working with group leaders to resolve problems pertaining to equipment and manpower needs on jobs they have procured. They also make sales calls and visit companies in an attempt to procure new business and may occasionally engage in such typical sales techniques as taking a customer representative out to lunch or to a sporting event.^{5/}

Estimators spend on average 1-day a week working in the field to help keep up with work. When they do so, estimators work the same as any other crew member. Not only do estimators work with crews when needed, it appears that they are often at customer's facilities to assure there are no problems with a job. Thus, Group Leader Bryan Miller related that if he had to pick the individual in charge at the customer location where he had spent most of his time the last year, it would be Estimator Dave Durham who is there approximately 40 percent of the time.

If either an existing customer or new customer is interested in the Employer's services, an estimator will prepare a bid based on his assessment of the equipment and manpower needs for that particular job. On some larger or more complicated projects, a group leader may accompany the estimator to evaluate what needs to be done and provide input as to how to perform the work. Generally, by the time a bid is written up, the price of the job has been agreed to with the customer. Some work, usually involving long term customers, is based upon the customer paying the cost of manpower and materials needed for the work – a time and materials (T & M) contract. Other jobs are bid on a set price – generally referred to as "bid work." Contracts for bid work over \$10,000 must be approved by General Manager Cable.

Estimators meet daily with Operation Manager Eschete over scheduling issues, workforce and equipment availability, and the cost of equipment and material. They meet occasionally, sometimes less than once a year, as a group with General Manager Cable in "forecast meetings," which are held to seek input from estimators in order for the Employer to develop long term projections of its equipment and manpower requirements.

Once a job is procured, the estimator turns in a job sheet, which sets forth, in general terms, the job that needs to be done, as well as the equipment and manpower required for the

^{4/} Only one estimator testified at the hearing in this matter. He had previously worked as a part of these crews. The parties stipulated that the other estimators, if called to testify, would have provided essentially the same testimony. Moreover, there are certain inferences that can be reasonably drawn from the record to support this conclusion, such as testimony that estimator Dave Durham, also still works as rigger for the Employer.

^{5/} In its brief, the Petitioner asserts that the Employer has two separate "divisions" – one being a "Sales Division," within which the estimators work, and the other an "Operations Division," within which the other unit employees work. However, this is simply not reflected in the record. Moreover, despite the use of quotes around each term, the words "divisions," "Sales Division" and "Operational Division" are not found anywhere in the transcript of the hearing in this matter, much less at the pages referenced in Petitioner's brief.

work. Manpower needs and scheduling are handled by Scheduler Mark Durham, who assigns a group leader to the job, as well as the other crew members. Most crews consist of two to four employees, plus the group leader. Occasionally crews can number in the low to mid teens – but it is unclear how often this occurs. An estimator may request that a specific group leader be put on a job – particularly if it is one where the group leader helped plan the details of the work – and Durham will generally honor this request if the man is available.^{6/} In staffing a crew, Durham must also consider whether the job requires any employees with special skills. With respect to some prospective jobs, there may be a group leader and crew already working at the customer’s facility who will be assigned the new work.

Material and equipment needs for jobs are handled by Buyer/Purchaser Anness; group leaders are also issued credit cards with a \$2,500 limit for material purchases. In addition to actually procuring material for a scheduled project, Anness may forecast the price of material to assist the estimators in making a job bid and arrange for equipment rental, which involves his dealing with leasing companies. Finally, if the Employer’s manpower needs dictate it, Anness will procure workers from temporary services. In these situations, temporary service employees are ordinarily paired with and work under the direction of one of the Employer’s regular employees.

Group Leaders

Once a job is set, if it has not already happened as a part of the bidding process, the group leader may review the work with the estimator to determine the project’s details. A customer will also designate a coordinator from its own staff, such as an engineer, to consult with the group leader and give direction as to the customer’s needs. The group leader sorts out the work details with his crew. Although the group leader is responsible for certain paper work aspects of the job (such as signing temporary workers’ time cards) and communication with the office or with the estimator, the actual manner of performing the work is often the result of the crew’s group effort. Even though the group leaders are generally the more experienced and knowledgeable employees, and most often provide any necessary direction, occasionally a crew member with a higher level of skill in a particular area will actually direct the crew. For example, if an employee skilled in heavy rigging is assigned to a crew for purposes of offloading and placing a large piece of equipment, his specialized knowledge and skill will place him in the position of directing the actual work of the crew. Group leaders like the other crew members, spend the bulk of their days doing physical work on the job and occasionally work by themselves or under other group leaders or crew members.

Group leaders may deal directly with customers when changes or additions are required for the work to be performed on a T&M job. In the past, oral agreements for such changes were permitted, but presently the Employer utilizes a “change order” form. It appears that group leaders seldom prepare change orders, but merely pass on the customers’ requests to whichever

^{6/} In its brief the Employer asserts that, “the field supervisors [group leaders] can request that specific laborers be assigned to their projects, which requests may be denied by the scheduler, usually because the requested employees are not available.” However, the transcript pages to which the Employer cites as support for this proposition are actually referencing estimators rather than the group leaders.

estimator procured the work. An estimator does all customer new bid work that is not a T&M job.

There are occasions when a customer's coordinator may ask if the crew will stay beyond the normal work day. If it is a T&M job, the group leader may agree, but with respect to overtime in a bid work situation, he will contact the estimator. The crew will be asked to stay over, but cannot be required to do so because overtime is considered voluntary. If employees do not want to work overtime, the group leader may call Scheduler Mark Durham to see if any employees are available. As a practical matter, however, it appears that most employees choose to work overtime, presumably for the extra pay. If a customer wants the crew to come back the next day and they are not scheduled to do so, even on a T&M job, this request must be cleared with Durham for scheduling purposes.

As noted previously, the Employer provides group leaders with a credit card with a limit of \$2,500 for purchasing necessary equipment and supplies. Group leaders also are supplied with a cell phone for communication and a pickup truck and gas card for work related transportation and material procurement. They may also use the truck to drive back and forth from their homes to work. There is some conflict in the record in this matter as to whether certain other employees may have been issued cell phones and pickup trucks.

All employees, including the group leaders, receive formal written evaluations. The only reference in the record pertaining to group leaders' involvement in employee evaluations involves Operation Manager Eschete's comments regarding whether group leaders wanted to work with certain employees or requested them, and a single phone call that Eschete made to Group Leader Vanderpoole about employee Earl Napier – with no specifics of what was asked or conveyed.

Employees may make a request to their group leader and/or Scheduler Durham to use one of their off days for a sick day or for some other reason. If the employee directs such a request to a group leader, the group leader informs Durham that the employee will be off, but does not approve or reject the request. It appears that, for the most part, employees prepare their own time sheets.

Vanderpoole and Napier

Although for the past 3 or 4 months Group Leader Vanderpoole has been off for health reasons, Vanderpoole and employee Napier have worked together at Lexmark, a customer of the Employer, for a number of years. Lexmark is located about 25 miles from the Employer's Lancaster facility. Vanderpoole's and Napier's main work at Lexmark involves preparing machinery for shipment -- crating it or placing it on skids and also moving equipment. Evidently most of the work at Lexmark is performed on a cost plus basis and generally they perform assignments given to them by Lexmark coordinator. Although Napier occasionally may pick up some overtime at other customer locations on weekends, both men have worked their regular hours exclusively at Lexmark for some time. However, this does not mean that they do not have contact with other employees, since other employees are occasionally assigned to work with them.

Vanderpoole has never been advised as to what authority he might possess as a group leader. However, in response to a leading question, he indicated that he could discipline Napier if Napier was not doing his job. Vanderpoole did not explain what he understood to be discipline, and there is no evidence that any disciplinary action has ever occurred. There is no indication in the record that the Employer has any formal disciplinary system. Indeed, when Scheduler Durham testified concerning the type of discipline he might issue, it is apparent that he only meant having an informal discussion with the offending employee. Similarly, in response to another leading hypothetical question, Vanderpoole speculated that if overtime was available for only one crew member, he could decide who received it. Again, this situation has never occurred.^{7/} Vanderpoole also was asked what he could do if a temporary employee was working at Lexmark and wanted to leave early or Napier wanted to leave early. No examples were elicited to establish that this situation had ever occurred and no testimony was offered as to who may have given Vanderpoole the authority to make any such decisions. Due to the nature of the long term arrangement with Lexmark, it appears that the Lexmark's coordinator determines the two employees' activities more so than Vanderpoole. In this regard, Vanderpoole testified that the Lexmark coordinator actually determines if they are going to work overtime.

The only noteworthy distinction between Vanderpoole's and Napier's conditions of employment at Lexmark from those of the other employees of the Employer, is that Lexmark requires a background check and drug screen for the purpose of issuing a badge for entry to the property. West, who will be taking over for Vanderpoole while he is off, will have to undergo the same screening process. Apparently employees sent to work at Lexmark to work on a limited basis are met at the gate by Vanderpoole or Napier.

Russell Caudill

As indicated earlier, there is a machine shop at the Employer's Lancaster facility, which contains lathes, drill presses and milling machines and Russell Caudill is Machine Shop Supervisor. Caudill maintains the shop equipment, as well as fabricates and machines parts, but due to a downturn in the need for fabricated or machined parts, Caudill now spends about ten percent of his time in the field doing such work as putting up guard rails, moving racks, and anchoring and building conveyors. In the past, there have been other employees working with Caudill in the shop, but at present only one employee, Ron Bates, occasionally works in the shop. Bates has been in the field for the last month and had only been in the shop approximately 1 day a week prior to that time. Caudill does not oversee Bates' work, since the estimators will advise Bates directly of work they wish him to do.

The record discloses that there were once two other employees in the shop to whom Caudill provided some level of oversight. However, even with respect to them, Caudill's oversight was limited to acting as a resource and consisted of offering advice as to how work could be done more quickly. The order of work production is determined by when the estimators need the particular components. Testimony elicited about Caudill's authority, again by a leading question, noted with no detail that Caudill occasionally has told employees including Bates, to

^{7/} Unfortunately, the record is replete with such leading hypothetical questions posed by both counsel and such evidence is of little probative value.

perform tasks after the conclusion of their shift. However, this direction ordinarily is something that an estimator or Scheduler Durham will tell an employee.

Apparently the only other employee working for the Employer is the mechanic, Sonny Drew. However, there is nothing in the record concerning his activities or responsibilities.

B. Common to all Employees:

All employees have the same work schedule and share the same benefits. The normal work hours for all non-office employees are 7 a.m. to 3:30 p.m. All employees are eligible to participate in the Employer's health plan and 401(k) retirement savings plan, receive a holiday ham or turkey, and are invited to the Employer's picnics and barbeques. All employees also receive vacation, usually 2 weeks, but apparently a third week of vacation may be given as a form of bonus. Eschete testified that the additional vacation week was given to individuals based on their performance as a supervisor, and certain group leaders have received a third week. However, there is some indication in the record that other employees have also received additional vacation. All crews receive monthly safety letters, which employees are expected to read and sign.

Employees' hourly wage rates, including the estimators, range from \$10 to \$23. Estimators also receive a commission, apparently in the 3 percent range for their successful bids, which is based on the bid amount.^{8/} Vanderpoole, in addition to his hourly pay, receives a 1 percent commission on the work performed for Lexmark. Wage rates for group leaders range from \$17 to \$21 per hour and occasionally other crew members may earn more than the assigned group leader.

III. THE SUPERVISORY ISSUE

A. The Legal Framework:

Supervisors are specifically excluded from the Act's definition of "employee" by Section 2(11) of the Act which defines a "supervisor" as:

any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

^{8/} Although the Petitioner asserts in its brief that the commission is based on the Employer's profit on a job, the record reflects that it is actually based on the gross dollar amount of the bid.

To meet the definition of a supervisor set forth in Section 2(11) of the Act, a person needs to possess only one of the 12 specific criteria listed, or the authority to effectively recommend such action. *Ohio Power Co. v. NLRB*, 176 F.2d 385 (6th Cir. 1949), cert. denied, 338 U.S. 899 (1949). The exercise of that authority, however, must involve the use of independent judgment. *Harborside Healthcare, Inc.*, 330 NLRB 1334 (2000). Thus, the exercise of “supervisory authority” in merely a routine, clerical, perfunctory or sporadic manner does not confer supervisory status. *Chrome Deposit Corp.*, 323 NLRB 961, 963 (1997); *Feralloy West Corp. and Pohng Steel America*, 277 NLRB 1083, 1084 (1985).

Possession of authority consistent with any of the indicia of Section 2(11) is sufficient to establish supervisory status, even if this authority has not yet been exercised. See, e.g., *Pepsi-Cola Co.*, 327 NLRB 1062, 1063 (1999); *Fred Meyer Alaska*, 334 NLRB 646, 649 at fn. 8 (2001). The absence of evidence that such authority has been exercised may, however, be probative of whether such authority exists. See, *Michigan Masonic Home*, 332 NLRB 1409, 1410 (2000); *Chevron U.S.A.*, 308 NLRB 59, 61 (1992).

In considering whether the putative supervisors involved here possess any of the supervisory authority set forth in Section 2(11) of the Act, I am mindful that in enacting this section of the Act, Congress emphasized its intention that only supervisory personnel vested with “genuine management prerogatives” should be considered supervisors, and not “straw bosses, leadmen, set-up men and other minor supervisory employees.” *Chicago Metallic Corp.*, 273 NLRB 1677, 1688 (1985). Thus, the ability to give “some instructions or minor orders to other employees” does not confer supervisory status. *Id.* at 1689. Such “minor supervisory duties” do not deprive such individuals of the benefits of the Act. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280-281 (1974), quoting Sen. Rep. No. 105, 80th Cong. 1st Sess., at 4. In this regard, the Board has frequently warned against construing supervisory status too broadly because an individual deemed to be a supervisor loses the protection of the Act. See, e.g., *Oakwood Healthcare, Inc.*, 348 NLRB No. 37, slip op. At 3 (2006); *Vencor Hospital – Los Angeles*, 328 NLRB 1136, 1138 (1999); *Bozeman Deaconess Hospital*, 322 NLRB 1107, 1114 (1997).

Proving supervisory status is the burden of the party asserting that such status exists. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711-712 (2001); *Arlington Masonry Supply*, 339 NLRB 817, 818 (2003); *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047 (2003). As a general matter, I note that for a party to satisfy the burden of proving supervisory status, it must do so by “a preponderance of the credible evidence.” *Dean & Deluca*, supra at 1047; *Star Trek: The Experience*, 334 NLRB 246, 251 (2001). The preponderance of the evidence standard requires the trier of fact “to believe that the existence of a fact is more probable than its non-existence before [he] may find in favor of the party who has the burden to persuade the [trier] of the fact’s existence.” *In re Winship*, 397 U.S. 358, 371-372 (1970). Accordingly, any lack of evidence in the record is construed against the party asserting supervisory status. See, *Williamette Industries, Inc.*, 336 NLRB 743 (2001); *Michigan Masonic Home*, 332 NLRB at 1409. Moreover, “[w]henver the evidence is in conflict or otherwise inconclusive on a particular indicia of supervisory authority, [the Board] will find that supervisory status has not been established, at least on the basis of those indicia.” *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). Consequently, mere inferences or

conclusionary statements without detailed specific evidence of independent judgment are insufficient to establish supervisory status. *Sears, Roebuck & Co.*, 304 NLRB 193 (1991).

The Board recently revisited the issue of supervisory status in *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (2006), in light of the Supreme Court's finding in *Kentucky River*. See also, *Croft Metals, Inc.*, 348 NLRB No. 38 (2006) and *Goldencrest Healthcare Center*, 348 NLRB No. 39 (2006), issued at the same time as *Oakwood*. In *Oakwood*, the Board addressed the Supreme Court's rejection of the Board's interpretation of Section 2(11) in the healthcare industry as being overly narrow and adopted "definitions for the term 'assign,' 'responsibly to direct,' and 'independent judgment' as those terms are used in Section 2(11) of the Act." *Oakwood*, supra, slip op. at 3.

With regard to the Section 2(11) criterion "assign," the Board considered that this factor shares with other Section 2(11) criteria the "common trait of affecting a term or condition of employment" and determined to construe the term "assign" "to refer to the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee." *Id.*, slip op. at 4. The Board reasoned that, "It follows that the decision or effective recommendation to affect one of these – place, time, or overall tasks – can be a supervisory function." *Id.* The Board clarified that, "... choosing the order in which the employee will perform discrete tasks within those assignments (e.g., restocking toasters before coffeemakers) would not be indicative of exercising the authority to 'assign.'" *Id.*

In *Oakwood*, the Board explained that, "responsible direction," in contrast to "assignment," can involve the delegation of discrete tasks as opposed to overall duties. 348 NLRB at slip op. 5-6. The Board reasoned, however that "for direction to be 'responsible,' the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employees are not performed properly." In clarifying the accountability element for "responsibly to direct" the Board noted that, "to establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps." *Id.*, at slip op. 7.

Assignment or responsible direction will, as noted above, produce a finding of supervisory status only if the exercise of independent judgment is involved. Independent judgment will be found where the alleged supervisor acts free from the control of others, is required to form an opinion by discerning and comparing data, and makes a decision not dictated by circumstances or company policy. *Id.* at slip op. 8. Independent judgment requires that the decision "rise above the merely routine or clerical." *Ibid.*

B. Group Leaders:

1. *The evidence does not establish that the group leaders can hire, transfer, suspend, lay off, recall, promote, discharge, reward, or discipline other employees, or adjust their grievances, or effectively to recommend such action:*

There is no evidence establishing that the group leaders can hire, transfer, suspend, lay off, recall, promote, discharge, reward, or discipline other employees, or adjust their grievances, or effectively recommend such action. Although, as noted previously, in response to a leading question, Vanderpoole speculated that he could “discipline” Napier, this issue has never come up; he was never told that he had such authority; and, there is no indication of what was meant by “discipline.” Because this testimony was merely responsive to a conclusory statement, speculative in nature, utterly lacking in specificity and was not otherwise supported in the record, it does not meet the Employer’s burden of establishing supervisory authority. See, *Austal USA, L.L.C.*, 349 NLRB No. 51, slip op. at 1 fn. 6 (2006) (purely conclusory evidence is not sufficient to establish supervisory status and most of employer’s evidence consisted of conclusory statements); *Avante at Wilson, Inc.*, 348 NLRB No. 71 (2006) (regarding assertion that LPN/RNs could discipline CNAs by sending them home: employer’s testimony was utterly lacking in specificity; one manager testified that she was familiar with LPN/RNs sending a CNA home, but failed to give any specific examples; another manager testified that she believed she had authority to send CNAs home when she was an LPN/RN 2 years earlier, but she did not explain basis of her belief or provide any examples); *Golden Crest Healthcare Center*, 348 NLRB No. 39, slip op. at 5 (2006) (recognizing that “purely conclusory evidence is not sufficient to establish supervisory status,” and pointing out that the Board “requires evidence that the employee actually possesses the Section 2(11) authority at issue”).

2. *Group leaders do not assign work within the meaning of Section 2(11) of the Act:*

With respect to the authority to assign, while it may be arguable that a group leader could “assign” an employee a particular task associated with, an equipment move (as could a non-group leader rigger), this is not in the nature of an assignment as contemplated by Section 2(11) of the Act. In this regard it should be noted that the assignment is not the act of designating an employee to a place, appointing an employee to a time, or giving an employee significant overall duties. Thus, the assignment of employees to specific roles in an overall task in order to get the job done is not considered to be the assignment of overall duties and does not rise to the level of “assign” within the meaning of the Act. *Sam’s Club, a Division of Walmart Stores, Inc.*, 349 NLRB No. 94, at slip op. 8 (2007). Moreover, the group leader’s assignment of employees to specific tasks is at least somewhat circumscribed by the specific skill needed to complete a job. Thus in these circumstances, the assignment of duties is self evident and not indicative of supervisory status. See, e.g., *Shaw Inc.*, 350 NLRB No. 37, at slip op. 2-3 (2007).

With respect to any assignment of overtime by the group leaders, it appears that employees choose to work overtime and are not forced to do so. In this regard, no examples were provided concerning a situation when the decision to work overtime was not a voluntary choice on the part of employees. It is certainly not established that the group leaders have the

ability to assign overtime within the meaning of Section 2(11) of the Act. See, e.g., *Golden Crest Healthcare Center*, 348 NLRB No. 39, slip op. at 4 - 5 (2006) (charge nurses requesting that CNAs stay past the end of their shift does not establish that they can assign employees to work overtime).^{9/}

3. *Group leaders do not responsibly direct other employees within the meaning of Section 2(11) of the Act:*

There is scant evidence in the record that the group leaders provide much direction of other employees in their work. Even were I to find that they do provide significant direction, there is no evidence that they responsibly direct employees within the meaning of Section 2(11) of the Act. As touched upon previously, in *Oakwood Healthcare*, the Board interpreted the phrase “responsibly to direct” as follows: “If a person on the shop floor has men under him, and if that person decides what job shall be undertaken next or who shall do it, that person is a supervisor, provided that the direction is both ‘responsible’ (as explained below) and carried out with independent judgment.” *Oakwood Healthcare*, supra, slip op. at 6 (internal quotations omitted). The Board then held that for direction to be “responsible,” the person directing the performance of a task must be accountable for its performance. *Id.* slip op. at 6-7. Further, the Board held that to establish accountability, “it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It must also be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps.” *Id.* at 7.

Although the group leaders provide some direction to other crew members (whether based upon their experience, expertise or position), it has not been established that they have been given the authority to take corrective action if their directions are not followed nor has it been shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps. Thus, it has not been shown that they responsibly direct other employees within the meaning of the Act. See, e.g., *Lynwood Manor*, 350 NLRB No. 44, (2007) (employer failed to show that RN/LPNs were accountable for their actions in directing the CNAs, since there was no evidence showing that RN/LPNs could be disciplined, receive a poor performance rating, or suffer any adverse consequences in their terms of employment due to a failure in a CNA's performance of routine functions).

For the forgoing reasons and based on the record as a whole, I conclude that the Employer has not meet its burden of proving that group leaders are supervisors within the meaning of Section 2(11) of the Act.

C. Machine Shop Supervisor:

As noted previously, Russell Caudill is the machine shop supervisor. However, even though he may carry the designation “supervisor” in his title, the term is not determinative of his

^{9/} As noted previously, Group Leader Vanderpoole was asked speculative questions about what he would do in certain situations – including with respect to overtime. Since Vanderpoole testified that he has never been told what authority he has, and no examples were elicited as to when he actually exercised the authority he was being asked to speculate about, I do not consider this to be probative evidence.

status. See, fn. 2. Although in the past Caudill may have exercised some oversight of an employee or two assigned to work in the shop with him, there is no evidence that he currently exercises any arguable supervisory authority. Presently, only employee Bates works on some occasions in the shop, but he spends most of his time in the field and receives no oversight or direction from Caudill. Bates' work in the shop is prioritized by the estimators rather than Caudill. The Employer offered no evidence that it plans to assign another employee to the shop – an unlikely event due to the declining work in the shop which has resulted in Caudill spending some time in the field. The fact that those in a position in the past may have possessed some supervisory authority, does not establish that Caudill currently does. See, e.g., *Avante at Wilson, Inc.*, 348 NLRB No. 71 at slip op. 3 (2006) (evidence offered that staff nurses had the authority to send CNAs home for insubordination at some previous time period; however, employer offered no evidence to show that the individuals working as staff nurses at the time of the hearing possessed that authority).

Moreover, the oversight that Caudill formerly provided primarily appears limited to acting as a resource and overseeing of the fabrication/machining process based on his skill and long experience. Such oversight does not make him a statutory supervisor. See, e.g., *First Western Building Services*, 309 NLRB 591, 601 (1992) (instructions given by a more experienced employee to a less experienced employee is not “responsible direction of employees” within the meaning of Section 2(11) because use of independent judgment is not involved; rather, it is “the authority of a skilled employee over an unskilled employee”); *Northern Chemical Industries*, 123 NLRB 77 (1959) (instrument leadman who looks after work of department and lays out work for other employees merely exercises judgment and direction of more experienced mechanic).

Caudill did relate, again in response to a leading question, that he has asked an employee or perhaps employees to “stick around and let’s get the job done” when there has been a need for overtime. There was, however, no time frame given, no example offered, no detail as to who might have authorized or ordered the overtime and no indication as to whether the employee could reject the friendly phrased proposal. This, again, is simply not probative evidence. Moreover, Caudill related that 90 percent of the time the estimator or Durham will advise a shop employee of overtime work.

Finally, the Employer argues that Caudill “had the ability to adjust employees grievances.” The Employer bases this assertion on the following exchange in the record:

Q. If Ron or Jewel or Dennis would have a beef about what was going on, would they bring it to you and would you have the ability to resolve it?

A. No, I would have to ask Mark or someone higher. Maybe one of the estimators.

Q. Okay.

A. I was not given the authority to resolve anything. But I was told that, I'll stand behind you a hundred (100) percent by Rick Cable.

Q. So, if you resolved matters, then Rick would stand behind you every time?

A. He said, "I'll stand behind you in anything you do," but I didn't have to do anything.

Q. But you could have then, the Plant Manager is telling you you could do those things and he would stand behind you, right?

A. Right.

The testimony appears internally contradictory as to whether Caudill had the authority to do anything – he testifies specifically that he could not resolve anything, but that the plant manager would stand behind him. In any event, since the colloquy involved the past tense and referred to employees who no longer work in the shop, it is hardly indicative of any present authority that Caudill might possess.

For the forgoing reasons, I conclude that the Employer has not meet its burden of establishing that the Shop Supervisor Caudill is a supervisor within the meaning of Section 2(11) of the Act.

D. The Estimators:

Although the Petitioner did not take the position that the estimators are supervisors within the meaning of the Act at the hearing in this matter, it did so in its post hearing brief. Much of the basis for the Petitioner's assertion is that the estimators are supervisors is not actually reflected in the record and, in any event, would not indicate possession of any of the indicia of supervisory status. For example, the Petitioner asserts that, "The estimator may even direct Caudill to work overtime to finish the job." There is no supporting evidence in the record for this assertion. It is stated in the Petitioner's brief that "if the Estimator has determined that a piece of equipment will be used on the job, the group leader must use that equipment." Again this statement is not reflected in the record; rather the record indicates that group leaders may request whatever equipment they feel they need not only through a request conveyed by an estimator to Scheduler Durham, but also directly to Durham. The Petitioner asserts that "the group leaders has no authority to make any materials change without the approval of the estimator." Again, this statement is not supported by the record. Although an estimator may request a particular group leader for work that he has bid on, Scheduler Durham may, or may not, honor that request.

In light of the above, I find that there is no evidence to support Petitioner's claim that the estimators are supervisors within the meaning of Section 2(11) of the Act.

IV. THE MANAGERIAL ISSUE

As noted previously, the Employer takes the position that Russell Caudill should be excluded from the unit as a managerial employee.

A. The Legal Framework:

Although not specifically referenced in the Act, the Supreme Court has established an outline for identifying individuals who have managerial responsibilities that exclude them from the protection of the Act:

Managerial employees are defined as those who “formulate and effectuate management policies by expressing and making operative the decisions of their employer.” . . . These employees are “much higher in the managerial structure” than those explicitly mentioned by Congress, which “regarded [them] as so clearly outside the Act that no specific exclusionary provision was thought necessary.” . . . Managerial employees must exercise discretion within, or even independently of, established employer policy and must be aligned with management. . . . Although the Board has established no firm criteria for determining when an employee is so aligned, normally an employee may be excluded as managerial only if he represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy.

NLRB v. Yeshiva University, 444 U.S. 672, 682-683 (1980) (citations omitted).

The party seeking to exclude either a whole class of employees or a particular individual as managerial has the burden of presenting the evidence necessary to establish such exclusion. *University of Great Falls*, 325 NLRB 83, 93 (1997); *Montefiore Hospital & Medical Center*, 261 NLRB 569 at fn. 17 (1982).

B. Application to the Shop Supervisor Position:

From the record evidence pertaining to Caudill’s duties and activities, it can hardly be said that he holds the sort of position “much higher in the managerial structure” than those explicitly mentioned by Congress, which “regarded [them] as so clearly outside the Act that no specific exclusionary provision was thought necessary.” *Yeshiva*, supra. He may be a highly skilled working machinist, but he does not hold any elevated position in the Employer’s hierarchy nor is he in any sort of policy making position.

For the foregoing reasons, I conclude that the Employer has not met its burden of establishing that the Shop Supervisor Caudill is a managerial employee who should be excluded from the unit.

V. UNIT PLACEMENT ISSUES

The Employer takes the position that Napier, Vanderpoole, Mills, West and Caudill (assuming the latter four are not excluded on other grounds) should be excluded from the Unit on community of interest grounds. The Employer further takes the position that the seven

estimators must be included in any unit found appropriate. The Petitioner takes a position contrary to that of the Employer with respect to the unit placement of all of these employees.

A. The Legal Framework:

Section 9(a) of the Act only requires that a unit sought by a petitioning labor organization be an appropriate unit for purposes of collective bargaining, and there is nothing in the statute which requires that the unit for bargaining be the only appropriate unit, or the ultimate unit or even the most appropriate unit. *Morand Brothers Beverage Company*, 91 NLRB 409, 418 (1950). Moreover, the unit sought by the petitioning labor organization is always a relevant consideration and a union is not required to seek representation in the most comprehensive grouping of employees unless an appropriate unit compatible to that requested does not exist. *Overnite Transportation Company*, 322 NLRB 723 (1996); *Purity Food Stores*, 160 NLRB 651 (1966).

The appropriateness of a given unit is governed by community of interest principles. In analyzing community of interest among employee groups, the Board considers bargaining history; functional integration; employee interchange and contact; similarity of skills, qualifications and work performed; common supervision, and similarity in wages, hours, benefits and other terms and conditions of employment. *Armco, Inc.*, 271 NLRB 350 (1984); *Atlanta Hilton & Towers*, 273 NLRB 87, 89 (1984); *J.C. Penney Co.*, 328 NLRB 766 (1999). In addition, the Board considers whether the employees, if excluded, would constitute a separate appropriate unit or would be more appropriately included with the other employees not within the unit. *Overnite Transportation Co.*, supra.

B. The Estimators:

The Petitioner has sought to include every employee of the Employer who is not a supervisor, managerial employee or office clerical in the Unit with the exception of the estimators. Essentially, the Petitioner has sought a wall-to-wall unit while excluding only one category of employee, the estimators. Thus, when the managerial and/or supervisory status of Buyer/Purchaser Charlie Anness was in dispute during the hearing, the Petitioner sought to include him as a “residual.” The Union still seeks to include Caudill and Drew in the Unit as a “residuals.” Apparently the Petitioner’s use of the term “residual” is in reference to the Board’s reluctance when fashioning overall or larger units to leave a residual unit if the employees could have been included in the larger group. See, e.g. *Huckleberry Youth Programs*, 326 NLRB 1272, 1274 (1998). Paradoxically, my agreement with the Petitioner with respect to the inclusion of all the other employees in the Unit (as set forth below) creates the situation that should I not include the estimators, this would leave a residual classification -- the situation which the Board seeks to avoid. Moreover, in the case before me, a unit of all employees, save one category, would appear to constitute simply an arbitrary grouping of employees. “The Board does not permit the arbitrary, heterogeneous, or artificial grouping of employees.” *Turner Industries Group, LLC*, 349 NLRB No. 42, slip op. 5 (2007) citing *Moore Business Forms, Inc.*, 204 NLRB 552 (1973); *Glosser Bros., Inc.*, 93 NLRB 1343 (1951). Finally, as demonstrated below, the estimators generally share such a strong community of interest with the workforce comprising the Unit, that they should be included in any event.

My analysis of the factors relevant to community of interest, with their application to the estimators, follows:

1. Functional integration:

The estimators are highly integrated into the Employer's operations, not only for the procurement of unit work, but also with respect to its performance and completion. Thus, the estimators will occasionally seek a group leader's input as to how the project can be accomplished while the estimator is compiling the bid. Following a successful bid, an estimator will often review the work to be done with the group leader. The estimator is involved with selecting the equipment to be used in the work and may also be involved in requesting the group leader for the work. It appears clear from the record that group leaders will often bring to the attention of the estimator who procured the job certain issues and expect him to resolve these issues. Finally, for significant periods of time, the estimators are used as a part of the crew actually performing physical work for the customers.^{10/}

2. Employee interchange and contact:

It appears that the estimators at one time worked full-time in the crews and moved into their positions from that background. It is clear that on average, 1-day per week, they go back into the crews and have work related contact.

3. Similarity of skills, qualifications and work performed:

It appears that one of the more valuable skills possessed by the Employer's crews is the ability to analyze and arrive at solutions with respect to how a particular project can be accomplished. This is the same skill utilized by the estimators in their work. Moreover, when working with the crews, the exact same skills that other crew members possess are utilized by the estimators.

4. Common supervision:

The Employer is a relatively small company and all employees are supervised by General Manager Cable and Operation Manager Eschete. Both group leaders and estimators deal with Scheduler Durham for scheduling manpower and with Buyer/Purchaser Anness for procuring supplies and equipment.

^{10/} It is arguable that the estimators are dual-function employees. The Board has long held that employees who perform more than one function for the same employer may be part of a bargaining unit if they regularly perform duties similar to those performed by unit members for sufficient periods of time to demonstrate that they have a substantial interest in the working conditions of the unit. *Columbia College*, 346 NLRB No. 69 (2006); *Harold J. Becker Co., Inc.*, 343 NLRB 51 (2004); *Berea Publishing Co.*, 140 NLRB 516, 519 (1963). However, there appears nothing to prevent the consideration of an employee's performance of work of the same nature as another category included in the unit, as part of an overall review of the community of interest factors associated with whether his/her classification should also be included in the unit.

5. Similarity in wages, hours, benefits and other terms and conditions of employment:

The estimators' hourly rate falls in the same range as the Employer's other employees. While they also receive a commission, Group Leader Vanderpoole likewise receives a commission on work at Lexmark. All employees have the same health insurance and 401(k) benefits available to them. All receive vacation, are invited to company picnics and cookouts and receive holiday turkeys or hams.

Based on the forgoing and the record as a whole, it is clear that the estimators have a strong community of interest with other unit employees. Moreover, in light of my other determinations herein, not including them in the Unit leaves a single classification of employee unrepresented – a result the Board seeks to avoid. I shall, therefore, include the estimators in the unit determined to be appropriate.

C. Vanderpoole and Napier:

There appears to be little distinction between Group Leader Vanderpoole's and Napier's situation and that of other unit employees. Even though they work exclusively at one facility away from the Employer's office, apparently all crews are performing work at one company or another away from the Employer's facilities. The fact that they at some point were required to have a background check and a drug screen appears to have little impact, if any, on their daily work or assignments.

A review of the following factors utilized in community of interest determinations convinces me that they should be included in the Unit:

1. Functional integration:

Lexmark is one of the Employer's customers. Like other customers, there appears to be an estimator (Larry Barry) who looks after its needs and with whom Vanderpoole consults with respect to certain issues. The work performed for Lexmark is in the nature of the core service provided by the Employer -- the preparation for movement and movement of machinery.

2. Employee interchange and contact:

Although Napier and Vanderpoole do not work elsewhere, other employees come to work with them. Moreover, when a replacement was needed for Vanderpoole during his medical leave, the Employer turned to its own work force and transferred West to the Lexmark operations. Thus, there is employee interchange between employees at this location and other unit employees who come in contact with Napier and Vanderpoole.

3. Similarity of skills, qualifications and work performed:

There is little in the record differentiating the skills of Vanderpoole and Napier from that of other unit employees. It would seem indicative of the commonality of at least some skills that

Napier at one point worked on other projects, that other employees are occasionally transferred to work at Lexmark, and that West, who obviously would have little experience at Lexmark, was transferred to Lexmark to be the group leader.

The Employer asserts that there is a distinction in the work performed at Lexmark from that at other locations because Napier and Vanderpoole deal with “lumber and wood” in their crating and skid building work. It is clear, however, that other employees work with such material because the Employer maintains a wood shop at Somerset. Moreover, the estimator who testified in this matter described his crew’s work assignments as crating a large dye at a different customer than Lexmark. In any event, the work at Lexmark is not confined to crating and skid building, but occasionally, involves the rigging and movement of large pieces of machinery.

4. Common supervision:

As with other unit employees, supervision over these employees rests with Operation Manager Eschete and General Manager Cable. As with other unit employees, Group Leader Vanderpoole occasionally works through the intermediary of the estimator servicing the customer with respect to certain job related issues. Moreover, Napier and Vanderpoole receive the same safety and work related communiqués from management as other unit employees receive.

5. Similarity in wages, hours, benefits and other terms and conditions of employment:

Napier’s and Vanderpoole’s hourly rates fall in the same range as other employees in the Unit. Vanderpoole like the estimators also receives a small commission on the work the Employer does for Lexmark. As noted previously, all employees are eligible for the same health insurance and 401(k) benefits, receive vacation, are invited to company picnics and cookouts and are provided with holiday turkeys or hams.

For the foregoing reasons, I have determined that Napier and Vanderpoole share a sufficient community of interest with other unit employee to warrant their inclusion in the Unit.

D. Randy West:

The Employer argues that since Group Leader West is taking over for Vanderpoole at Lexmark, West likewise does not have a community of interest with the Unit. For the reasons set forth above regarding Vanderpoole and Napier, I have determined that he does and I will include him in the Unit.

E. Brian Mills:

The Employer asserts that Group Leader Mills should be excluded from the unit on community of interest grounds since he has spent 95 to 100 percent of his time at one customer (R R Donnelly) during the past year. The customer is located about 15 miles from the

Employer's Lancaster facility. The Employer does not argue that Mills performs work of any different nature than other employees, is separately supervised or has any distinctly different terms and conditions of employment. Moreover, it appears that he works daily with other Unit employees at R R Donnelly. Although Mills has always spent a good deal of his time at R R Donnelly, he has also worked at other customers, including Lexmark. The sole fact that Mills spends much of his time at a single customer away from the Employer's facilities does not make his working conditions unique because most of the unit employees perform work away from the Employer's facilities at whatever company the Employer has procured as a customer. I, therefore, will include Mills in the Unit.

F. Russell Caudill:

It seems clear from the evidence that Shop Supervisor Caudill has a sufficient community of interest to be included in the Unit.

1. Functional integration:

Caudill's duties include fabrication and machining of parts to enable the Employer to install equipment work which is clearly associated with the essence of the Employer's business.

2. Employee interchange and contact:

Employees occasionally perform machining work in the shop. Caudill occasionally goes into the field to work. Moreover, group leaders and estimators are regularly at the facility where the shop is located and Caudill regularly deals with estimators in the performance of his duties.

3. Similarity of skills, qualifications and work performed:

As reviewed earlier, some of the Unit employees also possess machining and fabrication skills and Bates is qualified to work in the shop. Caudill is obviously qualified to perform some field work since he does so on occasion.

4. Common supervision:

As with other unit employees, Operation Manager Eschete and General Manager Cable have supervisory authority over Caudill. Like other unit employees, Caudill deals with estimators as intermediaries with respect to certain issues associated with his work.

5. Similarity in wages, hours, benefits and other terms and conditions of employment:

Caudill's hourly rate falls in the same range as that of the Employer's other employees. As noted previously, all employees have the same benefits, the only variation being that some employees receive an extra week's vacation.

For the foregoing reasons, I have determined that Russell Caudill has a sufficient community of interest with other unit employee to be included in the Unit.

G. The Mechanic:

Sonny Drew is the Employer's mechanic. There is nothing in the record concerning his activities or duties. At the hearing in this matter, the Hearing Officer stated that he understood that the parties were willing to agree that Sony Drew belonged in the unit. The Employer's Counsel's response was:

I'm unwilling to stipulate that he belongs in. We're not challenging him like these others, but I'm not going to stipulate that he's in.

I note that all of the Employer's employees share the same benefits and are subject to the same supervisory hierarchy. I also note that absent his inclusion, Drew would potentially be the only unrepresented employee. Because this is a situation that the Board will not, if at all possible, allow to occur since it precludes the possibility that the employee can ever choose to be represented by a labor organization, and because the Employer offered no reason for his exclusion from the Unit, I shall include Sonny Drew in the Unit. See, e.g., *United Rentals, Inc.*, 341 NLRB 540, fn. 11 (2004) (although the record was sparse concerning the terms and conditions of employment of an employee, she was included in unit, because otherwise she would be only unrepresented employee at facility); *Holiday Inn – Troy*, 238 NLRB 1369 (1978) (while petitioner did not include maintenance employee in proposed housekeeping unit, the Board included him as otherwise he would be the only unrepresented employee in department).

VI. EXCLUSIONS

In accord with the stipulation of the parties and based on the record as a whole, I find that General Manager Richard Cable, Operations Manager David Eschete and Administrative Office Manager Bobby Carrier are supervisors within the meaning of Section 2(11) of the Act. Accordingly, I shall exclude them from the unit found appropriate herein.

VII. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the above-referenced narrative, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.
3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

4. The Petitioner claims to represent certain employees of the Employer.

5. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

6. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and all regular part-time employees employed by the Employer working at or out of its facilities in the Commonwealth of Kentucky, including employees who perform work assignments outside of the Commonwealth of Kentucky, group leaders, estimators, the shop supervisor and the mechanic, but excluding the full time scheduler, full-time buyer/purchaser, office clerical employees, professional employees, guards and supervisors as defined in the Act.

VIII. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote on whether they wish to be represented for purposes of collective bargaining by Indiana Kentucky Regional Council of Carpenters and Millwrights, Millwrights Local #1031. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility:

Eligible to vote in the election are those employees in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible to vote are all employees in the unit who regularly averaged 4 or more hours of work per week for the last quarter prior to the eligibility date. *Davison-Paxon Co.*, 185 NLRB 21 (1970). Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are: (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters:

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). This list may initially be used by me to assist in determining an adequate showing of interest. I shall, in turn, make the list available to all parties to the election.

To be timely filed, the list must be received in the Regional Office on or before **October 19, 2007**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the Regional Office by electronic filing through the Agency website, www.nlr.gov,^{11/} by mail, or by facsimile transmission at (513) 684-3946. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party.

Since the list will be made available to all parties to the election, please furnish a total of **two** copies of the list, unless the list is submitted by facsimile or electronically, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations:

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to 12:01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days

^{11/} To file the list electronically, go to www.nlr.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu. When the E-File page opens, go to the heading **Regional, Subregional and Resident Offices** and click on the "File Documents" button under that heading. A page then appears describing the E-filing terms. At the bottom of this page, the user must check the box next to the statement indicating that the user has read and accepts the E-Filing terms and then click the "Accept" button. The user then completes a form with information such as the case name and number, attaches the document containing the request for review, and clicks the Submit Form button. Guidance for E-Filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Board's website, www.nlr.gov.

prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

IX. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received in Washington by **October 26, 2007**. The request may be filed electronically through E-Gov on the Board's web site, www.nlr.gov,^{12/} but may not be filed by facsimile.

DATED: October 12, 2007.

/s/ Gary W. Muffley, Regional Director

Gary W. Muffley, Regional Director
Region 9, National Labor Relations Board
3003 John Weld Peck Federal Building
550 Main Street
Cincinnati, Ohio 45202-3271

Classification Index

177-8520-0800
177-8520-2400
177-8520-4700
362-6790-0000
362-6795-0000
440-1780-6000
440-1760-7200
460-5033-7500
460-5067-4900

^{12/} Electronically filing a request for review is similar to the process described above for electronically filing the eligibility list, except that on the E-Filing page the user should select the option to file documents with the **Board/Office of the Executive Secretary**.